IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1951.

No. 338

The Carter Oil Company, *Petitioner,*

vs.

T. H. McCasland, N. W. Brillhart, Glenn Norville, Charles R. Rider, Thomas H. McCasland, Jr., Trust; Mary Frances McCasland, Trust; John Flack Burton, Trust; and James Leslie Burton, Trust,

Respondents.

REPLY BRIEF *of* PETITIONER.

A short reply brief may serve to correct some impressions sought to be left with the Court by the Answer Brief. In this Reply Brief, petitioner will be called Carter and respondents, McCasland.

A considerable portion of McCasland's Answer Brief is devoted to the merits of the case, and we think it is not appropriate that we undertake to reply to everything that is set forth. We are asking this Court to grant Certiorari and thereafter to review the case on the merits.

In *Palmer Oil Corporation* v. *Phillips Petroleum Company,* (1951) .... Okl. ...., 231 P. (2d) 997, 1012-1013, there is a definite expression which apprises this Court precisely what the Oklahoma State Supreme Court thinks of the questions herein presented as related to the rights of the parties under the contract. It doesn't matter at all whether that expression is in the syllabus of the case or appears only in the opinion itself. The thing of importance is that the Oklahoma Supreme Court has expressed itself on the very point involved and, for the purpose of Certiorari, we take it that is entirely sufficient.

From the Petition and Answer Brief already filed, the Court will know that actually the controversy comes down to one where the meaning of two phrases included in a single document must be arrived at to know the rights of the parties. Carter, in the assignment, granted to McCasland the leases in so far as they cover producing horizons above the depth of 4,000 feet, and Carter retained producing horizons below the depth of 4,000 feet with the right to produce the oil, gas and casinghead gas below that depth, all pursuant to the contract. There is nothing in the instrument which even remotely suggests that the rights of Carter are to be subordinated to those of McCasland. So far as the instrument shows, each has precisely the same right above and below the depth of 4,000 feet. The phrases are of equal dignity. There is no evidence in the record which tends to subordinate Carter's rights to McCasland's rights. The testimony of McCasland's own witnesses was entirely to the effect that a producing horizon is merely a sand or formation which is producing or may produce oil or gas (R. 74; R. 139, 140). Therefore, although respondents stress the grant to McCasland and minimize the reservation to Carter, yet the plain clear fact is that Carter retained whatever producing horizon or sand or formation that lay below 4,000 feet, just as McCasland received that same thing above 4,000 feet. When the grant and reservation are read together, they cannot be tortured into any other significance.

We freely say that McCasland is entirely correct that an oil and gas lease in Oklahoma gives exclusive right to the owner thereof to drill for and produce oil and gas from the leased land. That being true, the owner of a part of an oil and gas lease has the exclusive right to produce oil and gas from the part he owns. Carter owns the part below 4,000 feet and no one yet—neither opposing counsel nor the courts below—have given any reason why Carter does not have the same exclusive right that McCasland has to produce oil from its property. No adequate reason can be given.

On page 16 of McCasland's Answer Brief he sets out testimony from a deposition of Mr. F. W. Floyd. The deposition was taken by McCasland and was introduced by Carter. The testimony set out in McCasland's Answer Brief stops just short of showing exactly what Mr. Floyd actually said. That appears on page 233 of the record. After Mr. Floyd had testified that he wouldn't want to recommend the drilling of two wells close together (called twins) and that he wouldn't want to do it for contrariness, which obviously means he wouldn't want to do it just to cause the other fellow trouble or for spite, Mr. Floyd then testified postively:

Q. "I didn't ask that. As to the economics, if it would have been in your opinion a paying deal you would have recommended that?—A. Yes, sir.

Q. That is what I was talking about.—A. Yes, sir."

McCasland makes clear in paragraph 19 of his Answer Brief that Mr. Floyd formerly was Vice-President of Carter and negotiated an earlier contract which formed the pattern of the present contract, and that is true. It is just as true that, as such Vice-President of Carter, Mr. Floyd positively said that, if it would pay so to do, he would have recommended the drilling of the Woods Sand by Carter below 4,000 feet, notwithstanding McCasland had already drilled to a depth above 4,000 feet. Incidentally, the pattern contract referred to on page 19 of McCasland's Brief is the Mecklenburg contract which appears as defendant's Exhibit 11, commencing at page 270 of the record, and that contract does not make reference to "producing horizons" either in the WHEREAS clause or in paragraph 2 which is the paragraph calling for an assignment. The parties attach no significance to the term "producing horizons" except that it meant somewhere where oil might be had.

McCasland does not face up to the contract and assignment as they are written, and no more did the courts below. The opinion of the Court of Appeals for the Tenth Circuit says that Carter assigned to McCasland rights to oil

and gas producing horizons encountered at a depth of less than 4,000 feet (R. 289), and that court holds that, by reason thereof, McCasland has the right to take all oil from all horizons he encounters above 4,000 feet. This ignores Carter's reservation and, to be consistent, the court would have to hold that likewise Carter has the right to take all oil from all horizons it encounters below 4,000 feet. It is evident that the contract cannot give such right to both parties and it is equally evident that it does not give such right to either party. The court below does not address itself to the contract as written. Its opinion is palpably wrong and it ought to be corrected.

We respectfully ask that a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be granted herein.

Respectfully submitted,

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